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DAMANSARA REALTY BHD

v.

BUNGSAR HILL HOLDINGS SDN BHD & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
BALIA YUSOF WAHI J
[CIVIL SUIT NO: S4-22-1432-2007]
10 AUGUST 2009

C ***CONTRACT:*** *Agreement - Termination - Breach - Allegation of - Failure of plaintiff to complete development within 15 years - Whether a material breach - Time of the essence - Whether breach would entitle innocent party to treat contract at an end - Whether defendants justified in terminating agreement*

D

The claims of the plaintiff against the defendants were for some declarations and specific performance of a certain agreement. The facts were that by an agreement dated 7 January 1993 between the plaintiff and the defendants, the plaintiff was granted the rights
E to develop 15.5 acres of land in Damansara Heights ('Property Development Agreement (PDA'). Accordingly, the plaintiff was granted a term of 15 years from 4 July 1994 to exercise the development rights pursuant to the PDA expiring on 4 July 2009. The defendants issued a termination notice by way of a letter
F dated 25 October 2007, giving the plaintiff 30 days notice of its intention to terminate the PDA with effect from the same date. The defendants' termination notice expressly stated that the breach complained of was "incapable of rectification". It was the plaintiff's contention that the PDA did not require the plaintiff to
G commence and complete the development of the whole 15.5 acres comprising the development property within 15 years but that the plaintiff must commence development by applying for and obtaining a development order for any part of the development property within the 15 years. The plaintiff further contended that as at
H 25 October 2007, when the notice of termination was issued, the plaintiff had not repudiated the PDA. The plaintiff contended that it still had time to commence development by obtaining a development order in the remaining unexpired 19 months. Hence, according to the plaintiff, the notice of termination issued by the
I defendants was premature and bad in law. The defendant, however, argued that the PDA required the plaintiff to commence and complete the development within the 15 years period *ie*, the 15.5 acres must be developed by 4 July 2009. The defendant

submitted that as the plaintiff had not commenced any development by 25 October 2007 the plaintiff was not in a position to commence and complete the development of the development property by 4 July 2009. It was the defendant's argument that since no development had been carried out at all, by their own omission and/or neglect, the plaintiff had not exercised their development rights and thus no 'development interest' had accrued to them pursuant to the PDA. In such circumstances, the defendants contended that a 'material breach' within the meaning of cl.16 of the PDA had occurred which entitled them to issue a notice of termination thereunder. The issue for determination was whether there was a breach of the contract between the plaintiff and the defendants namely the property development agreement as alleged by the defendants.

Held: (dismissing plaintiff's claims):

(1) Courts often and generally look at the real nature of the transaction rather than the form of the transaction. The real nature of the transaction herein was that the parties intended to have the subject land developed within the 15 year period. Being a commercial contract, it was only sensible that the agreement must be construed in a commercially sensible manner and in a manner in which a reasonable commercial person would construe them. Taking into account the business relationship between the parties herein, it was only reasonable to assume that they intended to have the whole area developed. They had decided 15 years to be the time period and not for the plaintiff to start the development as what had happened now, at the very tail end of that period. Based on the factual matrix of the case and the commercial reality of the parties' relationship, it was the intention of the parties to have the development to be completed within the agreed time period of 15 years. (paras 31 & 34)

(2) It was only after the issuance of the termination letter that the plaintiff appointed Damansara Assets Sdn Bhd as the turnkey contractor to 'immediately take the necessary steps to appoint consultants to draw up the conceptual plan and procure such development plans and other documents as may be necessary for submission to DBKL for approval and issuance of the development order'. That was on 24 December 2007. Prior to that, on 21 November 2007, the plaintiff notified the second defendant that they were

A exercising their right to develop the development property then. For the last thirteen years prior to the notice of termination dated 25 October 2007, nothing of that sort had been done by the plaintiff. In a commercial contract such as this, time was definitely of essence and stipulation as to time
B in mercantile contracts were generally to be treated as condition, breach of which would entitle the innocent party to treat the contract as at an end. The delay on the part of the plaintiff to commence the development was so prolonged that it justified the defendants to terminate the contract and for
C concluding that the breach was a material breach.
(paras 38 & 41)

Case(s) referred to:
Bunge Corpn v. Tradex SA [1981] 2 All ER 313 ***(refd)***
D *Estate of Seow Khoon Seng v. Pacific Century Regional Development Ltd [1997] 1 SLR 509* ***(refd)***
Kerajaan Negeri Melaka v. Ariffin & Associates [2007] 8 CLJ 655 HC ***(refd)***
Liverpool City Council v. Irwin [1997] AC 239 ***(refd)***
Mannai Investment v. Eagle Star [1997] 3 All ER 352 ***(refd)***
E *Royal Selangor Golf Club, v. Anglo-Oriental (M) Sdn Bhd [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 HC* ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Unitramp v. Garnac Grain Co Inc [1979] 1 LLR 212 ***(refd)***
F *Universal Cargo Carvers Corpn v. Cotati [1957] 2 QB 401* ***(refd)***

For the plaintiff - Alex de Silva (S Shamalah with him); M/s De Silva
For the defendant - Tommy Thomas (Alan Gomez with him); M/s Tommy Thomas

G *Reported by Suhainah Wahiduddin*

JUDGMENT

H **Balia Yusof Wahi J:**

[1] The claims of the plaintiff against the defendants are for some declarations and specific performance of a certain agreement. The following are the remaining reliefs sought by the plaintiff against the defendant, namely:

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i. A declaration that the defendants' termination notice dated 25 October 2007 is *ultra vires* the property development agreement and hence is null and void;

ii. A declaration that the defendants' termination notice dated 25 October 2007 was wrongly issued without just cause and/or was issued *mala fide* and hence is null and void;

iii. A declaration that the defendants have wrongly and unlawfully denied the plaintiff's exercise of the development rights under the property development agreement pursuant to the plaintiff's letters dated 16 November 2007 and 21 November 2007;

iv. A declaration that the defendants have wrongly and unlawfully denied the plaintiff an opportunity to rectify any "material breach" complained of, if indeed there was a "material breach", pursuant to the property development agreement;

v. An order for specific performance of the property development agreement dated 7 January 1993;

vi. Pursuant to specific performance of the property development agreement, the plaintiff be granted a period of 19 months from the date of orders made herein, or such other time frame as deemed just and equitable by this honourable court, to exercise the development rights pursuant to the property development agreement;

vii. Such further or other reliefs deemed just and equitable by this honourable court.

viii. Costs.

Background

[2] By an agreement in writing dated 7 January 1993, between the plaintiff and the defendants, the plaintiff was granted the rights to develop lands measuring approximately 15.5 acres in Damansara Heights. This agreement is hereinafter referred to as "the property development agreement (PDA)". The development rights granted to the plaintiff to develop the property was for a term of 15 years from the date of completion of another related agreement in writing known as, "the property sale agreement". The property sale agreement was completed on or about 4 July 1994.

[3] Accordingly, the plaintiff was granted a term of 15 years from 4 July 1994 to exercise the development rights pursuant to the PDA expiring on 4 July 2009.

[4] The defendants issued a termination notice by way of a letter dated 25 October 2007, giving the plaintiff 30 days notice of its intention to terminate the PDA with effect from the same date. The defendants' termination notice expressly states that they are of the view that the breach complained of is "incapable of rectification".

[5] The plaintiff then commenced an action in the Kuala Lumpur High Court against the defendants for various declarations and orders to the effect that the defendants' termination notice was premature and wrongly issued and for the plaintiff to be allowed to exercise the development rights for the unexpired period that was denied to the plaintiff by the defendants' termination.

[6] The plaintiff also applied for an *ex parte* injunction orders that were granted by the court on 17 December 2007. The application was heard *inter partes* on 13 May 2008 together with the defendants' application to set aside the *ex parte* orders. On 28 May 2008, the court dismissed the plaintiffs' application and allowed the defendants' application to set aside the *ex parte* orders. The plaintiff then appealed to the Court of Appeal. The Court Appeal allowed the Appeal in that the injunction was reinstated until 4 July 2009 with an order for early trial.

The Plaintiff's Case

[7] The plaintiff was granted the rights to develop the development property for 15 years pursuant to cl. 1.1 of the PDA. Schedule 4 of the PDA provides how the plaintiff is entitled to exercise the rights. The plaintiff is given 15 years to "commence development" by obtaining a development order. Once a development order is obtained, then the plaintiff is "deemed" to have commenced development and is obliged to develop that area for which the development order was obtained within three years from the date the development order is obtained.

[8] The PDA entitles the plaintiff the discretion when to commence development by paying a higher "development property value" the longer the plaintiff takes to obtain a development order. That right to obtain the development order is preserved until it expires on 4 July 2009.

[9] The PDA does not require the plaintiff to commence and complete the development of the whole 15.5 acres comprising the development property within 15 years. However, the plaintiff must commence development by applying for and obtaining a development order for any part of the development property within the 15 years, ie, by 4 July 2009. What is granted for a term of 15 years is the right to develop the development property. The plaintiff is given 15 years to exercise that right.

[10] The plaintiff contends that as at 25 October 2007, when the notice of termination was issued, the plaintiff had not repudiated the PDA. The plaintiff contends that it still had time to commence development by obtaining a development order in the remaining unexpired 19 months. The plaintiff further contends that as at May 2008, the plaintiff was in a position to apply for a development order. This still left more than 14 months for the plaintiff to obtain a development order. Hence, the notice of Termination issued by the defendants was premature and bad in law.

The Defendants' Case

[11] The PDA requires the plaintiff to commence and complete the development within the 15 years period, ie, the 15.5 acres must be developed by 4 July 2009.

[12] As the plaintiff had not commenced development by 25 October 2007, the plaintiff is not in a position to commence and complete the development of the development property by 4 July 2009.

[13] The plaintiff had repudiated the PDA and this entitles the defendants to issue the notice of termination on 15 October 2007.

[14] Although there are no clauses or terms in the PDA that provide when the development is to start or that it must be completed in 15 years; the PDA read as a whole is to be interpreted to mean that the plaintiff must commence and complete the development in 15 years, ie, by 4 July 2009.

[15] Despite the expiry of more than 13 years, the plaintiff did not take any steps to commence development of the development project. No application for development was ever submitted by the plaintiff to the authorities, let alone securing a development order from the latter.

[16] The plaintiff has not taken the necessary steps that would have enabled it to take possession of the development property, nor has it paid the 2nd defendant the appropriate "development property value". Vacant possession of the development property has also remained and continues to remain with the 1st defendant, what, was and, is at all material times, the registered proprietor of the development property.

[17] No monitoring committee was ever set up or even proposed by the plaintiff. Neither has the plaintiff observed any of its development obligations under cl. 5 and/or schedule 2.

[18] The PDA requires the plaintiff to take numerous steps in order to set in motion the development of the development property. For a period of over 13 years, the plaintiff did not take any steps to develop the property; it was thus in continuous breach of the PDA. With 1 1/2 years of the PDA to run, there was repudiation on the part of the plaintiff, and by such repudiation, the PDA had been determined.

[19] Since no development had been carried out at all, by their own omission and/or neglect, the plaintiff had not exercised their development rights, and thus no "development interest" had accrued to them pursuant to the PDA. In such circumstances, the defendant contend that a "material breach" within the meaning of cl. 16 of the PDA had occurred which entitled the defendants to issue a notice to terminate thereunder. Because it is a practical impossibility to even start the development application process with the relevant authorities, let alone complete even part of the development project within the one month notice period, the defendants contend that the breaches on the part of the plaintiff were not rectifiable within the 30 day period contemplated by cl. 16.

The Evidence

[20] The plaintiff's main witness states that upon the inssuance of the termination letter dated 25 October 2007, the plaintiff replied *via* a letter dated 12 November 2007 (pp. 244-245 of the common bundle of documents) denying they were in breach of the PDA. Subsequently a letter dated 16 November 2007 was written to the 2nd defendant requesting for certain information which would be of assistance to them to plan the proposed development. Through another letter dated 21 November 2007 the plaintiff again wrote to the 2nd defendant notifying the defendant that

they are now exercising their right to develop the development property immediately from the date of the said letter. The plaintiff though the evidence of PW1 admits that they were waiting for the right moment and opportunity to commercially undertake the development and has been seeking for business partners or to appoint a party as a turnkey contractor to commence development for many years. It is also in evidence that the financial crisis in 1998 further had an effect on the plaintiff. After having commissioned CH William Talhar and Wong in 1995 to study the various development express, the plaintiff abandoned the idea after realising that it was not commercially viable to continue with the project.

[21] The witness went on to state that as early as 1995 itself there were negotiations between the plaintiff and one Luen Yum Development Sdn. Bhd. who came in as a purchaser of the land. After the end of the financial crisis, the plaintiff again started considering developing the development lands and sometime in 2000 and 2001 the plaintiff also considered a proposal made by the multi national hypermarket TESCO. Again the deal fell through. The plaintiff subsequently issued a letter dated 24 December 2007 to Damansara Assets Sdn. Bhd appointing the same as the Turnkey contractor to manage the development of the development property on the basis of design build and finance (pp. 72-75 CBD lampiran 28). By the said letter of appointment, Damansara Assets Sdn. Bhd shall "immediately take the necessary steps to appoint consultants to draw up the conceptual plans and procure such development plans and other documents as may be necessary for submission to Dewan Bandaraya Kuala Lumpur for approval and issuance of the development order" Subsequent to the appointment, Damansara Assests Sdn. Bhd. has prepared the layout plan and forwarded it to the 1st defendant on 7 May 2008 for the same to be executed by the 1st defendant as the landowner for approval of Dewan Bandaraya Kuala Lumpur for the issuance of the development order. The said layout plan were however returned to the plaintiff's solicitors *via* a letter of the defendant's solicitors dated 8 May 2008. The plaintiff reiterates that it is ever willing and able to exercise its rights under the PDA but was merely waiting for the right moment.

[22] On the part of the defendants, evidence were adduced to show that even as early as 1995 the defendants were already very concerned about the delay on the part of the plaintiff to commence development of the said property. The second

defendant's letter dated 4 July 1995 (pp. 259 encl. 26) has already indicated that the development was overdue. Similar views of the defendants are also expressed in the letters dated 16 September 1997, 30 May 1998. The defendants reiterate despite 13 years having lapsed, the plaintiff has not taken steps to commence development. No payment has ever been made for what is known as the development property value as provided under cl. 1 of sch. 4 of the PDA. No monitoring committee has been set up and there is also the failure of the plaintiff to pay the quit rent of the subject land. The defendants are of the view that it is impossible for the plaintiff to undertake and complete the project considering the numerous procedures and approvals that has to be obtained from the various government agencies and authorities concerning the development. The process would easily take a year or more before the final approval and the development order can be issued. Further, according to DW2 for the proposed project which comes under the "one stop centre" policy introduced by the authorities, and considering the size of the project, the time line involved in the issuance of the development order of such a project would be approximately 24 months upon submission.

Issue

[23] The issue for determination is whether there was a breach of the contract between the plaintiff and the defendants namely the property development agreement dated 7 January 1993 as alleged by the defendants.

[24] In its letter of termination dated 25 October 2007 (pp. 257 encl. 26) the defendants allege that there was a material breach and/or repudiation of the said agreement within the meaning of cl. 16.1 of the same. It is relevant to consider some of the clauses in the agreement and for that purpose (I shall list out the following clauses which in my view are most relevant for consideration of the matter:

[25] Clause 1 of the PDA provides that the 2nd defendant grants the right to the plaintiff to develop the development property for a term of 15 years. It is important to keep in mind that the right granted to the plaintiff is merely to develop the development property: the plaintiff is not conferred any rights or interests pertaining to the ownership of the land. The plaintiff's rights are thus purely contractual in nature arising solely from the PDA. The

plaintiff has no legal or beneficial interest in the development property: it merely enjoys a contractual right to develop and construct on it for the 15 year term.

[26] In cl. 3.1, the plaintiff agrees to use its best endeavours to procure that the development is begun and completed, and the sale of units constructed thereon "is effected in a timely manner".

[27] Clause 1.3 of the 4th Schedule of the PDA states that development shall be deemed to have commenced when a development order is granted by the relevant authority, and the plaintiff "shall complete each such part of phase of the development within three years of its commencement".

[28] Pursuant to cl. 2.1 of the same schedule, the plaintiff agrees to pay the 2nd defendant the appropriate "development property value" on the date the development order is secured from the relevant authorities or on physical possession being given to Damansara Realty of such part of phase of the development property, whichever is earlier;

[29] The detailed obligations of the plaintiff to undertake the development are set out in ten paragraphs in sch. 2. Clause 5.2 provides that for the purposes of ensuring compliance of the PDA, a monitoring committee, comprising six members, 3 of whom shall be jointly nominated by the defendants and 3 of whom shall be nominated by the plaintiff, shall be formed. Clause 5.2 further provides that the monitoring committee shall meet from time to time, and shall be entitle to examine the books, records, matters of things relating to the development.

[30] On termination of the agreement, cl. 16.1 provides as follows:

> 16.1. In the event of a material breach of this Agreement by the Company the Landowner or the New Developer or both shall be entitled to give notice to the Company to rectify the breach within thirty (30) days of the issue of the notice and if the breach is not rectified by the end of thirty (30) days the Landowner and the New Developer shall be entitled to terminate this Agreement summarily and thereupon the Development Property shall revert back to the Landowner and the New Developer and the Landowner and the New Developer shall be entitled to take such steps and actions as shall be necessary to repossess the Development Property.

Foremost, the construction of contract in a question of law. "In *Royal Selangor Golf Club, The v. Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 1 CLJ 995; [1990] 3 CLJ (Rep) 37 Lim Beng Choon J said:

> In considering the disputes of the parties I must first all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v. Wm Neil; & Son (St. Helen)* [1984] 1 All ER 555 where it is said at p 560: The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case): (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it" (See also: *Mulpha Pacific Sdn. Bhd v Paramount Corp. Bhd.* [2003] 4 MLJ 357).

[31] Having construed the contract entered into between the parties it is my considered view that it was the intention of the parties to be engaged in a relationship where the plaintiff would undertake to complete the project within the 15 year period. Courts often and generally look at the real nature of the transaction rather than the form of the transaction. The real nature of the transaction in the instant case is that the parties intended to have the subject land be developed within the 15 year period. It would be utterly absurd to hold on to the plaintiff's view that they have 15 years to start the project and if they decide to start it by obtaining the development order on the 14th year, they will have another three years to complete it. It cannot be so. It is evident that the plaintiff realized and understood the situation and the terms of the contract when way back in 1995 itself they have started considering the various development options but for one reason or another they just could not start the project on the grounds of not having suitable partners, not commercially viable and the effect of the economic crisis, to name a few. The development of the project is to be undertaken in stages and it is for that reason that the parties have included in the contract document the different "exercise period" and the "development

property value" in sch. 4 which provides for the different period at which development will or may take place and the different land value for that particular period.

[32] In *Estate of Seow Khoon Seng v. Pacific Century Regional Development Ltd* [1997] 1 SLR 509, GP Selvam J stated at p. 514:

> The construction of a document is a matter of law and it is the function of the courts to be performed after considering submissions of the parties. The purpose of construction of a document, in particular a contract made wholly in writing, is to ascertain the legal effect of its contents. *In the case of a contract it is to ascertain the mutual intention of the parties as expressed in the words of the agreement. It is an objective exercise and therefore the parties cannot give evidence as to what their intention was or what their views on the matter are. Objective factual matrix of the case is the only matter on which evidence should be admitted and acted upon*. It has been correctly stated that 'the judicial task is not to discover the actual intentions of each party, it is to decide what each was reasonably entitled to conclude from the attitude of the other'. See *Mc Cutcheon v. David MacBrayne Ltd* [1964] 1 WLR 125 AT P 128. Further as Lord Wilberforce said in *Reardon Smith Line Ltd v. Hansen-Tangen* [1976] 1 WLR 989 at p 996: "When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. (emphasis added).

[33] Being a commercial contract, it is only sensible that the agreement must be construed in a commercially sensible manner and in a manner in which a reasonable commercial person would construe them. The House of Lords in *Mannai Investment v. Eagle Star* [1997] 3 All ER 352, stated the rationale for such an approach by stating that:

> The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

[34] Taking into account the business relationship between the parties in this case, it is only reasonable to assume that they intended to have the whole area developed. And that takes time.

A They have decided 15 years to be the time period and not for the plaintiff to start the development as what has happened now, at the very tail end of that period. This is implied from the terms of the contract itself. Where there is, on the face of it, a complete bilateral contract, the courts are sometimes willing to add terms to B it: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain (*Liverpool City Council v. Irwin* [1997] AC 239). An implied term is where the court infers from evidence that the C parties to a contract must have intended to include it in the contract though it has not been expressly set out therein (*Sababumi (Sandakan) Sdn. Bhd. v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 FC, *Kerajaan Negeri Melaka v. Ariffin & Associates* [2007] 8 CLJ 655).

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[35] Based on the factual matrix of the case and taking into account the commercial reality of the parties' relationship, it is my considered view that it was the intention of the parties to have the development be completed within the agreed time period of E 15 years.

[36] Whether there was a breach of contract.

[37] In issuing the letter of termination dated 25 October 2007, the defendants allege that the plaintiff was in breach of the F contract and cl. 16.1 of the development agreement applies. In the said notice of termintion the defendants allege that in failing to take any steps to commence, let alone complete the development, there was a material breach of the agreement which by its very nature is incapable of rectification within the meaning G of the agreement. The defendants further contend there was repudiation of the agreement. Among of the breaches listed out by the defendants are:

a) failure on the part of the plaintiff to obtain any development H plan (cl. 1.3 sch. 4).

b) non-payment of quit rent on the said land (cl. 17.2).

c) no monitoring committee was set up (cl. 5.2).

I d) development property value not paid up (cl. 1 sch. 4).

[38] The evidence clearly sets out the above facts which were never disputed. It was only after the issuance of the termination letter that the plaintiff appointed Damansara Assets Sdn Bhd as the Turkey contractor to "immediately take the necessary steps to appoint consultants to draw up the conceptual plan and procure such development plans and other documents as may be necessary for submission to DBKL for approval and issuance of the development order". That was on 24 December 2007. Prior to that, on 21 November 2007 the plaintiff notified the second defendant that they are exercising their right to develop the Development Property then. For the last 13 years prior to the notice of termination dated 25 October 2007, nothing of that sort has been done by the plaintiff. In a commercial contract such as this, time is definitely of essence and stipulation as to time in mercantile contracts are generally to be treated as condition, breach of which would entitle the innocent party to treat the contract as at an end. (See: *Bunge Corpn v. Tradex SA* [1981] 2 All ER 313)

[39] When the delay in the performance of the contract becomes so prolonged as to go to the root of the contract, the aggrieved party is entitled to rescind the contract (see: *Universal Cargo Carvers Corpn v. Cotati* [1957] 2 QB 401).

[40] In *Unitramp v. Garnac Grain Co Inc* [1979] 1 LLR 212, it was held that the governing trust in determining whether any delay in one party performing its obligation was sufficient to justify the other party treating the contract as being repudiated, is whether such delay "would frustrate the commercial adventure". In other words, not just a commercially unacceptable delay but a delay that "frustrates the adventure".

[41] Repudiation is a serious matter and it is not to be lightly found or inferred. Going through the factual matrix of the matter herein, it is my finding that the delay on the part of the plaintiff to commence the development is so prolonged that it justifies the defendants to terminate the contract and for concluding that the breach was a material breach.

[42] The evidence shows that the layout plan for submissions to DBKL for purposes of obtaining the development order has been rejected by the defendants *via* their letter dated 8 May 2008.

A Even assuming that the submissions for obtaining the development order was made around that time, the plaintiff is still in no position to ensure that the said development order will be issued by the authorities within the time prescribed by the agreement. DW2 in his evidence states that under the 'one stop centre' system, it
B would take around 24 months upon submission for DBKL to issue the development order. In fact, DW2 even went further to state that what has been proposed to be submitted by the plaintiff for the proposed project is not sufficient for DBKL's approval for the development order. The plaintiff may be willing to undertake the
C project but is not able to do so.

[43] For the aforesaid reasons, the plaintiff's claims are hereby dismissed with costs.

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